



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Panellist: **Bhekinhlanhla Stanley Mthethwa**

Case No: **PSHS342-16/17**

Date of Award: **2 May 2017**

In the matter between:

NUPSAW obo Manqoba Michael Mkhwanazi

(Union / Applicant)

and

Department of Health- Kwazulu Natal

(Respondent)

Details of hearing and representation:

1. The matter was scheduled for arbitration hearing on 10 April 2017 at Prince Mshiyeni Hospital in Umlazi. Mr M Zweni, a trade union official from NUPSAW represented Mr MM Mkhwanazi (hereinafter referred to as the Applicant) and Mr S Nene who is an Assistant Director in Labour Relations represented the Department of Health (hereinafter referred to as the Respondent). The proceedings were digitally recorded.
2. Having presented their respective cases, parties agreed to submit heads of argument by 18 April 2017.

Preliminary points:

3. There were no preliminary points raised.

Issues to be decided:

4. I am to decide whether or not the dismissal of the applicant was substantively fair.

Background to the issue:

5. The respondent appointed the applicant in or around 2006 as a Porter. He was earning R105 450 in annually remuneration when he left employment. He continued in that capacity until the 1st October 2015 when his services were terminated for an alleged misconduct. The applicant sought reinstatement as a remedy.

Summary of evidence and arguments:

6. All witnesses gave evidence under oath. This is a summary and it reflects all the relevant evidence and arguments heard and considered in deciding this matter. The respondent led evidence of Mr Barnabas Nkosingiphile Qulo and Mrs Rosemary Gugulethu Mncube. The applicant also testified in support of his case. Their respective cases and evidence may be summarized as follows;

Respondent's case:

7. The respondent contended that the applicant committed an offence on 2 June 2015 when he was found in unlawful possession of 89 surgical gloves and 38 N95 masks of the employer/state property. As a result of the commission of the said offence he was charged, found guilty and dismissed. It was on this basis that the respondent contended that the applicant's dismissal was substantively fair.

The evidence of Barnabas Nkosingiphile Qulo

8. He was employed as a Security Manager. On 2 June 2015 he was called to the Main Entrance at about 13h05. He found the applicant in possession of unauthorised state property. He then directed the Security Officer to arrest the applicant and hand him over to the South Africa Police Service.

The applicant apologised for being in possession of unauthorised state property. The gloves that were found in the applicant's possession had a state batch number. The applicant was a repeat offender in that in 2009 he caught him with the Jumbo Rolls. He did not have any grudges with the applicant.

9. The batch numbers that are used to differentiate the state property were unique. That is how he managed to identify that the goods belonged to the hospital.

The evidence of Rosemary Gugulethu Mncube

10. She was employed as an Assistance Director in Labour Relations. She was the chairperson of the applicant's disciplinary hearing. The Security Officer testified that when he was searching the applicant's vehicle the applicant left before the completion of the search. He then alerted another Security Officer to re-search the applicant's vehicle. When Mr Mdingi searched the applicant's vehicle for the second time he found a grey bag in the boot. The applicant confirmed that bag belonged to him. The applicant did not deny the knowledge of the bag.
11. During the disciplinary hearing the applicant testified that the keys of his vehicle were always with him on the day. According to the applicant during the lunch time on the day he took his friends out for a braai. The applicant also testified that he did not know that there was a bag in the vehicle. He further stated that he believed that someone might have planted the bag in his vehicle. However, the applicant's only witness, Mr Cele testified that they found the applicant on the way and he gave them a lift. Mr Cele also testified that they did not know what was in the vehicle when they boarded.

Applicant's case:

12. It was the applicant's case that he did not commit any offence prior to his dismissal. He was dismissed for no valid and fair reason. It was on this basis that the applicant contended that his dismissal was substantively unfair.

The evidence of Manqoba Michael Mkhwanazi

13. On the day of the incident it was the first time to drive his car to work and he was very excited. It was not true that he did not give keys for his car to other people on the day. His colleagues were excited to see the car and he gave the keys to many different colleagues that were congratulating him. Some of his colleagues were switching on the car radio.
14. When he left the premises during the lunch time on the day he was with three of colleagues, Messrs. Nsibande, Rasta and Cele. The vehicle was searched by the Security Officer Cele at the gate and released him after the completion of the search. After Cele had completed the vehicle search; Mr Mdingi came out of the office running to search the vehicle again.
15. The bag that was found in the car belonged to him. However, Mr Mdingi only questioned him and left the other occupants. He also left other cars at the gate and only concentrated on his car. As the result other cars left without being searched. He thought Mr Mdingi had prior knowledge of the contents of his vehicle.
16. It was not true that he apologised to Mr Qulo after being caught.

Analysis of evidence and arguments:

17. The crisp issue in dispute is the substantive fairness of the dismissal. The respondent did not dispute the existence of a dismissal; therefore it bears the onus of proving, on a balance of probabilities, that the applicant's dismissal was substantively fair.
18. I wish to state upfront that I will not repeat all the evidence produced by both parties, but only evidence that assisted me to come to my conclusion as set out hereinafter.
19. It was common cause that the grey bag that had surgical gloves and the masks belonged to the applicant. Secondly, the applicant was charged and dismissed for being in unlawful possession of 89 surgical gloves and 38 N95 masks for the employer/state found in his grey bag.

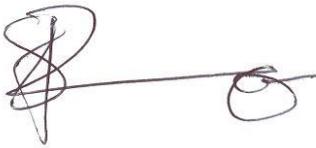
20. It should be noted that the applicant's case was that he did not commit any offence prior to his dismissal. It was also the applicant's defence that somebody might have planted the state property in his vehicle. He strongly believed that Mdingi was part of the cartel that planted the bag and the goods in the boot of his vehicle.
21. According to Mncube in terminating the applicant's services amongst others; she took into account that the keys of the vehicle was with the applicant at all relevant times on the day. Secondly, the applicant did not deny that the bag that contained surgical and masks belonged to him.
22. In this instance it is important and worth noting that the applicant did not dispute the evidence of Qulo that he apologized when he was caught with the items in question. He also failed dismally to explain why he did not dispute the evidence of Mncube that the keys of the vehicle were with him at all relevant times on the day. He did not give it to any person. In my view it was just an afterthought that the keys were also in the hands of his colleagues on the day.
23. I therefore find both Qulo and Mncube credible and reliable witnesses. In my view they had no reason to fabricate their versions but they consistently repeated their versions, even when questions designed to confuse them were put to them during cross-examination. Their evidence was clear: the applicant apologised when he was caught with the goods; the car keys were always with the applicant on the day; he left the first gate before the search was completed. When the second search was conducted by Mdingi the surgical gloves and masks were discovered from the grey bag in the boot of his vehicle. On the other hand the applicant's defence did not make sense and it was inconsistent, illogical and lacking in credibility. For this reason no doubt exists in my mind that the applicant was found in unlawful possession of the state property. I therefore reject the applicant's version in this regard
24. I therefore find on a balance of probabilities that the bag was not planted by anybody in the applicant's car. The applicant was aware that in the bag there were surgical gloves and the masks of the state; this was why he pulled off the first time before the Security Officer could complete the search. Accordingly, I find on a preponderance of probabilities that the respondent has discharged the onus of proving substantive fairness of the applicant's dismissal

Appropriateness of the sanction:

25. The process of deciding on the appropriate disciplinary sanction is complex. Dismissal should only be considered as a last resort and is normally reserved for most serious offences like theft, gross dishonesty, physical assault of the employer, and wilfully endangering the safety of others. In deciding whether or not the applicant should be dismissed, the following factors need to be taken into account: the applicant's length of service, his disciplinary record and, most importantly, the circumstances under which the conduct was committed.
26. The applicant was employed as a Porter for more than 10 years. The applicant had been caught in the same situation in 2009. This clearly tells that the applicant did not learn from his previous mistake. During this arbitration hearing he did not show remorse for his action. In my view given the objects of the public hospitals, I do not believe that such institutions should be burdened with employees who behave and conduct themselves like the applicant.
27. Any graduated disciplinary measures such as warnings would have always proved fruitless to someone who behaves like the applicant. In my view the applicant was the architect of his own misfortune and he deserves a severe punishment and the dismissal was appropriate in the circumstances.
28. In the circumstances I make the following award:

Award:

29. I find the dismissal of Mr Manqoba Michael Mkhwanazi substantively fair in terms of the provisions of the Labour Relations Act and the Disciplinary Code of the respondent.
30. Mr Manqoba Michael Mkhwanazi's application is dismissed and he is not entitled to any relief.
31. No order for costs is made.

A handwritten signature in black ink, consisting of a large, stylized initial 'S' followed by a horizontal line and a small circular flourish at the end.

Arbitrator: Bhekinhlanhla Stanley Mthethwa